In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 460

JOHN LAPINE AND FRANCIS LAPINE, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The decision and order of the Board are reported at 146 NLRB No. 128.

JURISDICTION

The order of the court of appeals was entered on July 10, 1964 (Pet. App. A). On August 5, 1964, the court denied a petition for rehearing, but granted a

stay of certain paragraphs of its order pending the filing and disposition of a petition for a writ of certiorari.[1] The petition was filed on September 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals, in order to protect its exclusive jurisdiction to enforce a Board back pay award, properly enjoined State attachment proceedings instituted by creditors of the beneficiary of the award.

STATUTE INVOLVED

The relevant statutory provisions are set forth in Appendix A, *infra*, pp. 8-9.

STATEMENT

On April 24, 1964, the Board issued a Decision and Order finding, *inter alia*, that the Company[2] had discriminatorily discharged Gary M. Lechner in violation of Section 8(a)(3) of the National Labor Relations Act, and ordering it to make Lechner whole for any loss of earnings resulting therefrom. 146 NLRB No. 128. As a result of discussions between Board personnel and representatives of the Company, the Board estimated

[1] A copy of the court's ruling on the petition for rehearing and on the stay is set forth in Appendix C, *infra*, pp. 17-18.

[2] Jack W. Sellers, Virginia Sellers Roper, Gladys Sellers, and L. H. Penney, Co-partners, d/b/a Coca-Cola Bottling Co. of Sacramento, *et al.*

that the back wages payable to Lechner under its order exceeded $4,000 (Inj. Pet., par. 3, Appendix B, *infra*, pp. 12-13).[3]

Prior to the Board's order, petitioners John and Francis Lapine had obtained a judgment against Lechner in a suit in a California State court. After the Board's order the State Marshal, Marietta, pursuant to a writ of execution which the State court issued upon its judgment, demanded from the Company and attached the back wages due Lechner under the Board's order. In response thereto, the Company issued to Marietta, as Marshal, a check for $4,202.75 (Inj. Pet., par. 4, Appendix B, *infra*, p. 13).

Following the issuance of the check the Board, pursuant to Section 10(e) of the Act, petitioned the court below for enforcement of its order against the Company. The Board simultaneously sought an injunction restraining and nullifying the attachment action on the ground that such action impinged on the court's exclusive jurisdiction to enforce the Board's order (Inj. Pet., par. 5, Appendix B, *infra*, pp. 13-14).

The court of appeals (Judges Madden, Hamley, and Jertberg), granted the relief requested by the Board. The court enjoined petitioners Lapine from taking further steps to attach the back pay due Lechner under the Board's order; enjoined Marshal Marietta from turning over to petitioners the check obtained from the Company and ordered him to return it to the Company; and directed the Company to

[3] "Inj. Pet." refers to the Board's petition to enjoin attachment of back pay award, filed in the court of appeals. A copy of the petition is set forth in Appendix B, *infra*, pp. 10-16.

cancel that check and to issue a new one to the Board's Regional Director, payable to the order of Lechner (Pet. App. A).

ARGUMENT

The action of the court of appeals constituted a proper exercise of its equitable power, and is in accord with settled principles. No issue warranting review by this Court is presented.

1. "A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice. * * * A back pay order is a command to pay an amount *to the Board* as agent for the injured employees." *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27 (emphasis added). Moreover, when a Board back pay award is contested, it does not become final until it has been reviewed and enforced by the court of appeals, whose jurisdiction, Section 10(e) of the Act provides, "shall be exclusive." If creditors of the beneficiary of a Board back pay award were permitted to levy upon it before it had been finally approved by the court of appeals and the money had been turned over to the employee beneficiary, "the power of the court effectively to enforce its decree, either as originally entered or as modified as circumstances might require, would be subject to partial or complete frustration." *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757, 760-761 (C.A. 9). Moreover, such premature attach-

ments would impede the efficient administration of the Act by involving the Board in collateral litigation and by delaying, until the final termination of the State court proceedings, compliance with the back pay award. In these circumstances, it was a proper exercise of the equitable power of the court of appeals [4] to enjoin the effectuation of the State attachment action. Accord: *National Labor Relations Board v. Sunshine Mining Co., supra; National Labor Relations Board* v. *Stackpole Carbon Co.*, 128 F. 2d 188 (C.A. 3).[5]

2. Contrary to petitioners' contention (Pet. 8-9), there is no conflict between the decision below and *National Labor Relations Board* v. *Ozanne Inc.*, 307 F. 2d 80 (C.A. 1), which warrants resolution by this Court. Although the First Circuit in *Ozanne* declined to issue a similar injunction sought by the Board, that court accepted the principle that a Board back pay award ordinarily is entitled to be protected against State attachment proceedings. For the court in effect

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[4] Section 10(e) of the Act empowers the court of appeals, pending a final decision on the Board order, "to grant such temporary relief or restraining order as it deems just and proper." Section 1651 of Title 28 of the United States Code further empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions * * *."

[5] Section 2283 of Title 28 of the United States Code does not bar the injunction. Although that section provides that a United States court may not enjoin proceedings in a State court, it is expressly inapplicable "where [an injunction is] necessary in aid of its jurisdiction * * *." In the present case, as shown in the text, the injunction was "in aid of [the court's] jurisdiction" to enforce the Board's order. See *Capital Service, Inc.*, v. *National Labor Relations Board*, 347 U.S. 501.

overruled its earlier decision in *National Labor Relations Board* v. *Underwood Machinery Co.*, 198 F. 2d 93 (C.A. 1), where (Judge Magruder dissenting) it had expressed the contrary view.[6] It nevertheless declined to grant an injunction because "we have now learned that while this matter has been pending in this court the debtor was defaulted in the state proceedings and the deputy sheriff, in due course, has collected from the employer on execution" (*National Labor Relations* v. *Ozanne Inc.*, 307 F.2d 80). Although the facts in the present case and in *Ozanne* are substantially the same, the differing views of two courts of appeals, which are in agreement on the governing principle, as to whether these similar facts warrant an injunction, does not create a conflict of sufficient importance to require this Court to resolve it.

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[6] The First Circuit stated in *Ozanne* (307 F.2d 80):

"Even if the employer's obligation to comply is an attachable obligation, which the Board disputes, on further consideration, we think that Judge Magruder, in dissenting in Underwood Machinery Co., was correct, and that it is more important that the Board's regular procedure be not interfered with than that some individual creditor be deprived of one of his possible remedies. Cf. NLRB v. Sunshine Mining Co., 9 Cir., 1942, 125 F. 2d 757."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

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Attorney,
National Labor Relations Board.

OCTOBER 1964

APPENDIX A

The relevant statutory provisions are as follows:

Section 10 (e) of the National Labor Relations Act, 29 U.S.C. Sec. 10 (e).

> The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order, and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing

before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28:

28 U.S.C. Sec. 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. Sec. 2283. Stay of State Court Proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JACK W. SELLERS, VIRGINIA SELLERS ROPER, GLADYS SELLERS, AND L. H. PENNY, CO-PARTNERS, d/b/a COCA-COLA BOTTLING COMPANY OF SACRAMENTO, COCA-COLA BOTTLING COMPANY OF MARYSVILLE; COCA-COLA BOTTLING COMPANY OF SACRAMENTO, LTD., d/b/a LAKE TAHOE COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY OF SACRAMENTO, LTD.; C-C CONCESSION COMPANY, INC., RESPONDENTS.

PETITION TO ENJOIN
ATTACHMENT OF BACKPAY AWARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, herein called the Board, respectfully petitions the Court for an order restraining the institution or prosecution of proceedings in the courts of the State of California by certain alleged creditors of Gary M. Lechner, a former employee of respondents,

> Jack W. Sellers, Virginia Sellers Roper, Gladys Sellers, and L. H. Penny, Co-Partners, d/b/a Coca-Cola Bottling Company of Sacramento, Coca-Cola Bottling Company of Marysville; Coca-Cola Bottling Company of Sacramento, Ltd., d/b/a Lake Tahoe Coca-Cola Bottling Co.; Coca-Cola Bottling Company of Sacramento, Ltd., C-C Concession Company, Inc.

insofar as such state proceedings have the purpose and effect of interfering with proceedings in this Court, instituted simultaneously herewith, under Section 10(e) of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*) for the enforcement of an order of the Board, dated April 24, 1964 and reported in 146 NLRB No. 128. Said order among other things, awarded back wages to Gary M. Lechner. This petition is ancillary to the enforcement proceedings, and the injunctive relief herein sought is in the interest of protecting the exclusive jurisdiction of this Court over the subject matter thereof, and in the interest of preventing frustration of or interference with the effectuation of such decree as may issue therein. The power of the Court to afford the requested protection and to prevent interference with its proceedings is conferred both by Section 10(e) of the Act and by 28 U.S.C. Sec. 1651, the All Writs Section, of the Judicial Code. In support of this petition the Board respectfully shows as follows, upon information and belief:

1. On April 24, 1964, in a proceeding entitled JACK W. SELLERS, VIRGINIA SELLERS ROPER, GLADYS SELLERS, AND L. H. PENNY, CO-PARTNERS, d/b/a COCA-COLA BOTTLING COMPANY OF SACRAMENTO, COCA-COLA BOTTLING COMPANY OF MARYSVILLE; COCA-COLA BOTTLING COMPANY OF SACRAMENTO, LTD., d/b/a LAKE TAHOE COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING COMPANY OF SACRAMENTO, LTD.; C-C CONCESSION COMPANY, INC.

and

GARY M. LECHNER, AN INDIVIDUAL

and

SACRAMENTO COCA-COLA BOTTLERS EMPLOYEES' UNION

Case Number 20-CA-2655 on the docket of the Board, reported in 146 NLRB No. 128 (attached hereto as Exhibit A), the Board issued its Decision & Order, finding that respondents engaged in unfair labor practices within the meaning of the National Labor Relations Act, and ordering respondents to cease and desist from such practices and to take certain affirmative action including, among other things, the payment of back wages to Gary M. Lechner to reimburse him for losses sustained as a consequence of his discriminatory discharge. That portion of the Board's order which requires the payment of back wages reads as follows:

> Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, their officers, agents, successors, and assigns, shall:
>
> * * * * *
>
> (b) Offer to Gary M. Lechner immediate and full reinstatement to his former or substantially equivalent position and make Lechner [and another employee] whole for any loss of earnings occassioned by the discrimination against them.

2. Simultaneously herewith the Board is filing its petition seeking enforcement of its aforesaid Decision and Order, including the provisions thereof quoted above, and requiring respondents, their officers, agents, successors, and assigns to comply therewith.

3. Subsequent to the issuance of the Board's order, conferences were held between personnel of the Board's Regional Office and representatives of the respondents for the purpose of ascertaining the amount necessary to make Gary M. Lechner whole in accordance with the terms of the Board's order.

Upon the basis thereof, the Board estimates that back wages which are payable to Gary M. Lechner under the Board's order amount to a sum in excess of $4,000.

4. Subsequent to the issuance of the Board's order, Steve Marietta, acting as Marshal for the County of Sacramento, State of California, in pursuance of a writ of execution issued upon a judgment dated January 24, 1964, entered in a proceeding in the Superior Court of the State of California in and for the County of Sacramento, entitled John Lapine and Francis Lapine, plaintiffs v. Gary M. Lechner, defendant, Case Number 147,869, made demand upon the respondents for and purported to attach the back wages due Gary M. Lechner under the Board's order. Thereupon, in response to said demand and in recognition of said attachment, respondents presented to Steve Marietta, as Marshal, a check in the sum of $4,202.75, on account of the back wages due from respondents to Gary M. Lechner, under the Board's order. Said check, or the proceeds thereof, is now held by and is in the possession, custody, and control of Steve Marietta, as Marshal, and will momentarily be turned over to John and Francis Lapine, unless prohibited by this Court.

5. The payment by respondents to Marshal Marietta of the sum of $4,202.75, was made in disregard and derrogation of respondents' obligation under the Board's order to make payment of backpay directly to Gary M. Lechner, himself, and insofar as respondents may reasonably be expected to resist a second payment, serves to frustrate or to impede compliance with any backpay enforcement decree which this Court may enter. Payment of the backpay, in turn, by Marshal Marietta to John and Francis Lapine, would interfere with the exclusive jurisdiction of the Court

over the subject matter of the enforcement proceedings. The execution process served upon the respondents, and their payment of $4,202.75 thereunder, is predicated upon state law and procedure governing the application of money owed under a private debt to the satisfaction of a state court judgment. The money due and owing by respondents under the Board's order and any decree which this Court may enter thereon, does not represent a private debt, but on the contrary, an obligation affected with a public interest. In the Board's view, that interest will best be served by a direct reimbursement of back wages to the employee. Accordingly, the public policies reflected in the National Labor Relations Act justify an appropriate order effecting the discontinuance of the judgment creditor execution proceedings and restraining John Lapine and Francis Lapine and Steve Marietta from further interfering with the Board's order and this Court's present exclusive jurisdiction over the subject matter of the enforcement proceedings. This would also remove an apparent impediment to compliance with any decree which this Court may enter, confirming the Board's order.

WHEREFORE, your petitioner respectfully requests:

(a) That an order to show cause be issued directed to John Lapine, Francis Lapine and Steve Marietta, returnable at a time and place as directed by this Court, requiring said persons to show cause:

Why John Lapine and Francis Lapine and their agents should not be enjoined by order of this Court from instituting, prosecuting, maintaining or perfecting any proceeding, or from invoking legal process to carry into effect, or from accepting any benefit from the writ of execution or levy, served or made upon respondents

Jack W. Sellers, Virginia Sellers Roper, Gladys Sellers, and L. H. Penny, Co-Partners, d/b/a Coca-Cola Bottling Company of Sacramento, Coca-Cola Bottling Company of Marysville; Coca-Cola Bottling Company of Sacramento, Ltd., d/b/a Lake Tahoe Coca-Cola Bottling Co.; Coca-Cola Bottling Company of Sacramento, Ltd., C-C Concession Company, Inc.

or any of them, insofar as the intent or effect of such proceeding, legal process, writ of execution or levy is to attach the obligation of said respondents under the Board's order issued against respondents on April 24, 1964, to pay back wages to Gary M. Lechner, as described in this petition; or from seeking to make or making said respondents' obligation under said Board order attachable as a private debt; or from otherwise, in any like or related manner, interfering with or seeking to interfere with respondents' compliance with any decree which this Court may enter enforcing said order of the Board; or from subjecting respondents' obligation to pay back wages under the Board's order to the jurisdiction or control of any other court or legal authority than this Court; and

Why said Steve Marietta, a Marshal of the State of California, should not be restrained from turning over to John Lapine and Francis Lapine or their nominees any money or property which came into and is presently in his possession, custody or control, by reason of any proceeding instituted by or on behalf of John Lapine and Francis Lapine to attach or levy against any obligation due or to become due under the Board's order, issued against respondents on April 24, 1964, for the reimbursement of back wages by respondents to said Gary M. Lechner.

(b) That on the return of said order to show cause this Court issue an order permanently restraining John Lapine and Francis Lapine and Steve Marietta in the manner detailed in paragraph (a) above.

(c) That pending the return of said order to show cause John Lapine, Francis Lapine and Steve Marietta be restrained in the manner detailed in paragraph (a) above.

(d) That the Court grant such other and further relief as may be just and necessary to protect the Board's order and the exclusive jurisdiction of this Court over the enforcement thereof.

Dated at Washington, D. C., this 18th day of June, 1964.

NATIONAL LABOR RELATIONS BOARD

By .....
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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19356

ORDER

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JACK W. SELLERS, VIRGINIA SELLERS ROPER, GLADYS SELLERS, and L.H. PENNY, CO-PARTNERS, d/b/a COCA-COLA BOTTLING COMPANY OF MARYSVILLE; COCA-COLA BOTTLING COMPANY OF SACRAMENTO, LTD., d/b/a LAKE TAHOE COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY OF SACRAMENTO, LTD.; C-C CONCESSION COMPANY, INC., RESPONDENTS

On Petition for Rehearing
and Motion for Stay

Before: MADDEN, Judge of the Court of Claims, and HAMLEY and JERTBERG, Circuit Judges

The petition for rehearing is denied.

Paragraphs (3), (4) and (5) of the order of this court, entered herein on July 10, 1964, are stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the respondents herein, providing such petition is filed in the clerk's

office of the Supreme Court of the United States on or before September 8, 1964. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

* * * *

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